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No. 04-883

Supreme Court, U.S.
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In The

Supreme Court of the United States

GARY McDOWELL and ROSELEA McDOWELL,

Petitioners,

v.

PROVIDENCE HEALTH PLAN,
an Oregon non-profit corporation,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF IN OPPOSITION

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PARTIES TO THE PROCEEDINGS
CORPORATE DISCLOSURE STATEMENT

Petitioners are Gary and Roselea McDowell, defendants below and cross-respondents to Providence Health Plan's conditional cross-petition for writ of certiorari, filed January 31, 2005.

Respondent Providence Health Plan was the plaintiff below and is also the cross-petitioner in its conditional cross-petition for writ of certiorari. Respondent's sole member is Providence Plan Partners, a Washington non-profit corporation, whose sole member is Providence Health System-Oregon, an Oregon non-profit corporation ("PH-OR"). PH-OR has as its sole member the Sisters of Providence-Mother Joseph Providence, a Washington non-profit corporation, which has as its members the Provincial Superior and members of the Provincial Council of the Sisters of Providence-Mother Joseph Providence.

There are no publicly held companies that own more than ten percent of the stock of respondent, its members, or its members' members. Respondent is a non-profit corporation and has no stock.

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BRIEF IN OPPOSITION

The petition for writ of *certiorari* should be denied because the United States Circuit Court for the Ninth Circuit correctly determined that the federal court lacked subject matter jurisdiction over respondent's state law breach of contract claim, because the claim was not completely preempted by the Employment Retirement Income Security Act of 1974 ("ERISA"). The Ninth Circuit's decision does not conflict with any decision of this Court or of another United States court of appeals. In the circumstances of this case, the fact that the Ninth Circuit's decision conflicts with a decision of two intermediate state appellate courts does not warrant this Court's review.

OPINIONS BELOW

The opinion of the Ninth Circuit Court of Appeals in *Providence Health Plan v. McDowell* addressed the consolidated appeals of two unpublished decisions of the United States District Court for the District of Oregon in cases numbered 01-1704-JE ("*McDowell* I") App. E-1 – E-7 and 02-6110-TC ("*McDowell* II") App. F-1 – F-7. In its original opinion, filed on March 24, 2004, a unanimous three-judge panel of the Ninth Circuit reversed the district court's decision in *McDowell* I and remanded the case to the district court for further proceedings. The Ninth Circuit panel also affirmed the district court's decision in *McDowell* II. *Providence Health Plan v. McDowell*, 361 F.3d 1243 (9th Cir. 2004). The Ninth Circuit panel filed an amended opinion on October 1, 2004, which reached the same result as did its initial opinion. *Providence Health Plan v. McDowell*, 385 F.3d 1168 (9th Cir. 2004). App. A-1 – A-13. On the same date, the court also entered an order

denying petitioners' petition for rehearing *en banc*. App. B-1. Circuit Judge Thomas, joined by five other active judges, filed a dissenting opinion arguing that rehearing *en banc* should have been allowed. App. C-1 – C-5.

JURISDICTION

The Ninth Circuit filed its amended opinion and an order denying the petition for rehearing or rehearing *en banc* on October 1, 2004. The petition for writ of *certiorari* was docketed on December 30, 2004. By letter dated January 27, 2005, this Court granted respondent until March 2, 2005, to file its brief in opposition. This Court has jurisdiction pursuant to 28 U.S.C. § 1254.

STATUTORY PROVISIONS INVOLVED

29 U.S.C. § 1132(a)(3) states:

"(a) Persons empowered to bring a civil action A civil action may be brought –

"(3) by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provision of this subchapter or the terms of the plan[.]"

29 U.S.C. § 1144 states in relevant part:

"(a) Supersedure; effective date

> "Except as provided in subsection (b) of this section, the provisions of this subchapter and subchapter III of this chapter shall supercede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan described in section 1003(a) of this title and not exempt under section 1003(b) of this title. This section shall take effect on January 1, 1975."

COUNTER-STATEMENT OF THE CASE

These consolidated cases involve respondent's attempts to enforce its undisputable contractual right to reimbursement from a third-party settlement obtained by petitioners for health care costs incurred by respondent on petitioners' behalf. Petitioners have filed a petition for writ of *certiorari* asking this Court to review the Ninth Circuit's decision in *Providence Health Plan v. McDowell*, 385 F.3d 1168 (2004). App. A. The Ninth Circuit's opinion addresses two district court decisions that were consolidated for purposes of appeal. The questions presented by the petition for writ of *certiorari* address the issue raised in *McDowell* I: Does the federal court have removal jurisdiction over a health care contractor's state court breach of contract claim against a beneficiary to enforce a reimbursement provision of the health care services contract?[1]

[1] *McDowell* II addresses a closely related question: When no adequate remedy is available at law, is a health care services contractor entitled to enforce the terms of a contract with a beneficiary in equity under 29 U.S.C. § 1132(a)(3)? The question presented by the Ninth Circuit's decision affirming *McDowell* II is the subject of respondent's conditional cross-petition for writ of *certiorari*.

With regard to *McDowell* I, the Ninth Circuit held that the federal court lacked removal jurisdiction over respondent's state law claim, because ERISA does not completely preempt a health care contractor's state law breach of contract action to enforce against the beneficiary a reimbursement provision of its health care services contract. The circuit court's opinion is correct and does not warrant review by this Court.

I. Summary of Facts

In February, 1990, petitioner Gary McDowell applied through his employer for health coverage with respondent's predecessor in interest by merger. App. G-2; A-2. On the same application, petitioner Roselea McDowell applied for coverage as Gary McDowell's spouse. App. G-2. Petitioners renewed their coverage each subsequent year. App. G-2. Respondent issued a health care services contract ("contract") to petitioner's employer, effective January 1, 2000, under which petitioners were provided health insurance coverage subject to all the terms of the contract. App. G-2; A-2 – A-3.

In February, 2000, petitioners were injured in an automobile accident. App. A-3. Respondent paid a total of $32,429.18 for petitioners' medical care for the injuries they sustained in the accident. App. A-3. Paragraph 11.2 of the contract required petitioners to repay those sums, less a proportionate share of reasonable attorney fees, to respondent from any third-party recovery. App. G-3; A-3. Additionally, on May 25, 2000, petitioners signed and their counsel accepted a trust agreement, through which petitioners irrevocably directed their counsel to comply with the contract's reimbursement provision. App. A-3; G-3.

In February, 2001, petitioners brought suit in Washington state court against both the driver of the vehicle which struck them and the driver's employer. Petitioners settled the action for an amount which respondent believes to be approximately $500,000. App. G-3; A-3. Petitioners refused to honor their obligation under the contract and trust agreement to repay respondent from the proceeds of the third-party settlement. App. A-3 – A-4; G-4.

To enforce petitioners' contractual reimbursement obligation, respondent filed *McDowell* I in Linn County, Oregon, Circuit Court on October 18, 2001, alleging that petitioners had breached their agreement in both the contract and the trust agreement to reimburse respondent from any third-party recovery for benefits paid on petitioners' behalf. App. G-1 – G-6. Petitioners removed the case to the United States District Court for the District of Oregon, claiming that ERISA completely preempted respondent's state law breach of contract claim. Petitioners also filed a motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(6), alleging that the relief sought by respondent was unavailable under ERISA, and that respondent's complaint therefore failed to state a claim for relief. App. H-4. Respondent opposed the motion to dismiss and filed a motion to remand the case to state court. App. E-2.

The district court denied the motion to remand and granted the motion to dismiss on the ground that respondent's state law breach of contract claim was preempted by ERISA. App. E-1 – E-7.

On April 12, 2002, respondent filed a second action, under ERISA, against petitioners in the United States District Court for the District of Oregon for specific performance of the reimbursement provision of the contract

and the trust agreement (*McDowell* II). App. H-1 – H-7. Respondent alleged that the district court's decision in *McDowell* I left respondent with no adequate remedy at law to enforce its contract with petitioners. As a result, under the federal common law of equity, respondent was entitled to specific performance of those contracts as "appropriate equitable relief" under 29 U.S.C. § 1132(a)(3). App. H-5 – H-6. Relying on this Court's decision in *Great-West Life & Annuity Insurance Co. v. Knudson*, 534 U.S. 204 (2002), the district court granted petitioners' motion to dismiss and denied respondent's motion for summary judgment as moot. App. F-1 – F-7. Respondent appealed both from the judgment in *McDowell* I and from the judgment in *McDowell* II. The Ninth Circuit subsequently granted respondent's motion to consolidate the two cases for purposes of appeal. App. A-2.

On appeal, a panel of the Ninth Circuit reversed the judgment in *McDowell* I. The panel concluded that ERISA does not preempt respondent's state law breach of contract claim and that respondent's claim fell outside the scope of ERISA's civil enforcement scheme. App. A-10. Consequently, the court concluded that the federal court lacked jurisdiction over the claim and that removal was improper. App. A-10. The panel reversed and remanded *McDowell* I with instructions to remand the case to state court. App. A-10.[2]

Petitioners filed a petition for rehearing and suggestion for rehearing *en banc*. The panel unanimously rejected the

[2] The same panel affirmed the judgment in *McDowell* II. App. A-10. The Ninth Circuit had jurisdiction over respondent's timely appeal from the judgment in that case under 28 U.S.C. § 1291.

petition. App. B-1. Six members of the Ninth Circuit dissented from the denial of the hearing *en banc*. App. C-1 – C-5.

II. Basis for Federal Jurisdiction

In *McDowell* I, respondent filed a breach of contract action in state court to enforce its contractual reimbursement rights. Petitioners removed the case to federal district court. As the Ninth Circuit concluded, the district court did not have subject matter jurisdiction over respondent's state law breach of contract claim. This Court has jurisdiction to decide that jurisdictional question. 28 U.S.C. § 1254.[3]

The Ninth Circuit had jurisdiction over respondent's timely appeal from the judgment in *McDowell* I under 28 U.S.C. § 1291.

REASONS FOR DENYING THE PETITION FOR WRIT OF *CERTIORARI*

In *Great-West Life & Annuity Insurance Co. v. Knudson*, this Court decided that 29 U.S.C. § 1132(a)(3) did not authorize a fiduciary to sue a beneficiary in equity to enforce a reimbursement provision of a health care

[3] In *McDowell* II, the district court had jurisdiction pursuant to 29 U.S.C. § 1132(a)(3) over respondent's claim for appropriate equitable relief under ERISA. The district court determined otherwise, however, and held that the federal court had no equitable jurisdiction under ERISA over respondent's claim for specific performance. This Court has jurisdiction to decide that jurisdictional question as well. 28 U.S.C. § 1254.

services contract, because the claim seeking to recover money damages, was not equitable. 534 U.S. at 221. The Court acknowledged, however, that other remedies outside ERISA might be available to the fiduciary, and expressly left open the issue "whether a direct action by petitioners against respondents asserting state-law claims such as breach of contract would [be] preempted by ERISA." *Id.* at 220.

In reversing the judgment in *McDowell* I, the Ninth Circuit correctly answered the question left open by this Court in *Great-West* by holding that ERISA does not completely preempt respondent's state law breach of contract action. In reaching that conclusion, the circuit court appropriately applied the law as defined by this Court and by prior Ninth Circuit decisions. Contrary to petitioners' assertions otherwise, the decision does not conflict with a decision of any other federal circuit court. And while the Ninth Circuit's decision is contrary to a decision of the Oregon intermediate appellate court and a decision of the California intermediate appellate court, that conflict is not sufficiently significant to warrant review by this Court. Supreme Court Rule 10(a), 10(c). This Court should deny the petition for writ of *certiorari*.

ARGUMENT

I. The Ninth Circuit's Conclusion That Respondent's State Law Breach of Contract Action May Go Forward in State Court Is Correct

The Ninth Circuit correctly identified the two-part test for determining whether a state law claim concerning a plan governed by ERISA is removable to federal court:

the claim must both "be preempted by ERISA and must fall within the scope of ERISA's enforcement provisions". *Providence Health Plan*, 385 F.3d at 1171, citing *Metro. Life Ins. Co. v. Taylor*, 481 U.S. 58, 62-66 (1987); App A-5. The court concluded that respondent's state law breach of contract action failed each prong of this test, and therefore was not removable to federal court.

A. Respondent's State Law Breach of Contract Action Does Not "Relate to" an ERISA Plan

ERISA's preemption provision, 29 U.S.C. § 1144(a), provides that ERISA "shall supercede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan described in section 1003(a) of this title and not exempt under section 1003(b) of this title."[4] To determine when a claim "relates to" an ERISA plan under this statute, the Ninth Circuit looked to this Court's decision in *New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645, 655-56 (1995). *Id.* at 1171-72; App. A-6. There, the Second Circuit Court of Appeals had held that a state law requiring hospital surcharges from certain health plans but not others was preempted by ERISA, reasoning (as do petitioners here)

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[4] An "employee welfare benefit plan" under ERISA is a "plan . . . maintained by an employer . . . *to the extent* that such plan . . . was established or is maintained for the purpose of providing for its participants . . . medical, surgical, or hospital care. . . ." 29 U.S.C. § 1002(1) (emphasis added). This statutory language makes clear that a document containing promises from an employer offering benefits to employees is, *to that extent*, an ERISA plan. To the extent the document also contains other promises, such as a promise to reimburse the insurer for benefits paid from a third-party recovery, those promises are not part of the ERISA-regulated plan.

that "ERISA's pre-emption clause must be read broadly to reach any state law having a connection with, or reference to, covered employee benefit plans." *Blue Cross & Blue Shield*, 514 U.S. at 653.

This Court reversed and in so doing flatly rejected the broad view adopted by the court below:

> If "relate to" were taken to extend to the furthest stretch of its indeterminacy, then for all practicable purposes pre-emption would never run its course, for "[r]eally, universally, relations stop nowhere." . . . But that, of course, would be to read Congress's words of limitation as mere sham, and to read the presumption against pre-emption out of the law whenever Congress speaks to the matter with generality.

Id. at 655. Instead, the Court focused on whether a state law acts to "bind plan administrators to any particular choice and thus function as a regulation of an ERISA plan itself." *Id.* at 659. If "state laws leave plan administrators right where they would be in any case, with the responsibility to choose the best overall coverage for the money," this Court determined that "such state laws do not bear the requisite 'connection with' ERISA plans to trigger pre-emption." *Id.* at 662. The Court limited the reach of ERISA's preemption provision to state laws that impose "conflicting directives" on ERISA plans – that is, state laws that either mandate employee benefit structures or their administration, or subject plans or plan administrators to alternative enforcement mechanisms. *Id.* at 658, 662. The Court then held that a state law provision for surcharges had only an indirect economic effect on the relative costs of various health insurance packages in a given state, and was "a far cry from those 'conflicting

directives' from which Congress meant to insulate ERISA plans." *Id.* at 662.

The Ninth Circuit concluded that respondent's state law breach of contract claim was not preempted because it lacked the requisite connection to an ERISA plan:

> Here, the district court determined that the breach of contract action related to an ERISA plan because it sought the enforcement of a plan provision, the reimbursement provision. The district court erred in this respect because Providence's action for breach of contract does not have the requisite "connection with" or "reference to" an ERISA plan. Providence is simply attempting, through contract law, to enforce the reimbursement provision. Adjudication of its claim does not require interpreting the plan or dictate any sort of distribution of benefits. Providence has already paid ERISA benefits on behalf of the McDowells, and they are not disputing the correctness of the benefits paid. Rather, Providence claims that the McDowells have breached two promises: (a) the reimbursement provision incorporated into their ERISA plan, as it applies to monies paid to them by a non-ERISA third party, and (b) their agreement to direct their lawyer to reimburse Providence in the event of a settlement. Because this is merely a claim for reimbursement based upon the third-party settlement, it does not "relate to" the plan.

Id. at 1172; App. A-7.

Petitioners disagree with the Ninth Circuit's conclusion, and instead would interpret 29 U.S.C. § 1144(a) to preempt any claim by a fiduciary against a beneficiary, no

matter the circumstances. According to petitioners, any claim that "affects the relationship between the plan and the plan members [is] completely preempted." Petition at 18. Petitioners distinguish *Blue Cross & Blue Shield* on its facts, noting that the claim in that case was not a claim by a fiduciary against a beneficiary. Petition at 15-17. Petitioners' arguments ignore this Court's holding in *Blue Cross & Blue Shield*, which establishes that it is the nature of the claim and its impact on the administration of an ERISA plan, and not merely the relationship of the parties to the claim, that determine whether the claim "relates to" an ERISA plan for purposes of preemption.[5] 514 U.S. at 668.

As the Ninth Circuit noted, the existence of respondent's state law claim "does not require interpreting the plan or dictate any sort of distribution of benefits." *Providence Health Plan*, 385 F.3d at 1172; App. A-7. Nor does respondent's state law claim mandate employment benefit structures or their administration, or subject plans or plan administrators to alternative enforcement mechanisms. *See, e.g., Blue Cross & Blue Shield*, 514 U.S. at 658.[6] The

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[5] Petitioners would rely instead on this Court's decision in *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41 (1987), a case that predates the *Blue Cross & Blue Shield* decision. In *Pilot Life*, the Court held that a claim by a beneficiary against a fiduciary for improper processing of a claim for benefits was "related to" an ERISA plan and therefore preempted. 481 U.S. at 52, 56. This conclusion is consistent with the Court's holding in *Blue Cross & Blue Shield*, because the claim in *Pilot Life* directly implicated the provision of benefits under an ERISA plan, while the claim in *Blue Cross & Blue Shield* did not.

[6] Petitioners claim that respondent's state law breach of contract action is an "alternative enforcement mechanism" and is thus preempted. Petition at 16 n.7. This Court's decision in *Blue Cross & Blue Shield* makes it clear that ERISA preempts alternative methods by which *beneficiaries* can enforce their rights under an ERISA plan. 514

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Ninth Circuit correctly determined that respondent's breach of contract claim lacked sufficient connection to an ERISA plan to bring it within ERISA's preemption provisions.[7]

B. Respondent's State Law Breach of Contract Action Does Not Fall Within ERISA's Civil Enforcement Provisions

The Ninth Circuit also determined that respondent's breach of contract action fails the second requirement of removal jurisdiction because it does not fall within the scope of ERISA's civil enforcement provision, 29 U.S.C. § 1132(a):

> As a fiduciary to the plan, Providence's only vehicle for relief in addressing violations or seeking enforcement of a plan is § 1132(a)(3). However, that section allows a fiduciary to seek only equitable relief for violation of the plan. Here, Providence is seeking ordinary damages – monetary relief – based upon contractual remedies that arise under state law. Therefore, its claim is not within ERISA's civil enforcement provisions.

U.S. at 658. A *fiduciary's* claim for breach of contract to enforce a reimbursement provision is not an "alternative enforcement mechanism" since, under this Court's decision in *Great-West*, ERISA does not provide an enforcement mechanism.

[7] In both the trial court and on appeal, respondent argued that its state law claim was not completely preempted for a separate reason: because it is saved from preemption by 29 U.S.C. § 1144(b)(2)(A), which provides that "nothing in this subchapter shall be construed to exempt or relieve any person from any law of any State which regulates insurance. . . ." The Ninth Circuit did not reach this issue, and petitioner does not raise it in his petition. Respondent reserves the right to address this issue should the Court consider the merits of this case.

Providence Health Plans, 385 F.3d at 1172-73 (citations omitted), App. A-8. In reaching its conclusion, the Ninth Circuit relied on this Court's decision in *Great-West*, in which the Court concluded that § 1132(a)(3) did not authorize a fiduciary to enforce a reimbursement provision in federal court, but left open the question answered by the Ninth Circuit below. *Id.* at 1173; App. A-8.

Petitioners disagree with the Ninth Circuit's formulation of the test for removal, arguing that "[t]he panel apparently believes that removal is dependent not only on Providence's claim 'relating to' the plan, but also on the claims's 'falling within the scope of § 1132.'" Petition at 19. According to petitioners, "any claim to enforce the plan falls within the scope of § 1132, which is the exclusive means of enforcing a plan. If § 1132 does not authorize Providence's claim in this case (and it does not), then no claim exists." Petition at 20.

Contrary to petitioners' assertions, this Court's decision in *Metropolitan Life Insurance Co. v. Taylor*, 481 U.S. 58 (1987), establishes that, to be removable to federal court, a state law claim must not only be preempted under 29 U.S.C. § 1144(a), but must also fall within ERISA's civil enforcement scheme, 29 U.S.C. § 1132. In the *Taylor* case, a former employee brought suit against his former employer and its insurer alleging breach of contract, retaliatory discharge and wrongful termination of disability benefits. 481 U.S. at 61. The defendants removed the case to federal court and the trial court denied the plaintiff's motion to remand and entered judgment for the defendants. *Id.* at 61-62. The federal circuit court reversed. *Id.* at 62. On *certiorari*, this Court began by noting that the plaintiff's state common law causes of action asserting improper processing of a claim for benefits under an

ERISA plan were preempted by ERISA. *Id.* at 62. That conclusion, however, did not end the inquiry. The Court went on to note that:

> There is no dispute in this litigation that [the plaintiff's] complaint, although pre-empted by ERISA, purported to raise only state law causes of action. The question therefore resolves itself into whether or not the *Avco* principle can be extended to statutes other than the LMRA in order to recharacterize a state law complaint displaced by [§ 1144(a)] as an action arising under federal law. In *Franchise Tax Board*, the Court held that ERISA preemption, without more, does not convert a state claim into an action arising under federal law. The court suggested, however, that a state action that was not only preempted by ERISA, but also came "within the scope of § 502(a) [§1144(a)] of ERISA" might fall within the *Avco* rule.

Id. at 64 (internal citations omitted).

In *Avco Corp. v. Machinists*, 390 U.S. 557 (1968), the Court held that in the context of the Labor Management Relations Act, Congress so completely preempted the area of labor-management contracts that any state cause of action for violation of a contract between an employer and a labor organization was necessarily federal in character and preempted, notwithstanding the fact that state law would provide a cause of action in the absence of the federal preemption statute. 390 U.S. at 560-61. This principle is an exception to the general rule that a federal defense does not authorize removal of a state law claim to federal court.

In *Taylor*, the Court held that the *Avco* principle applied with equal force to ERISA preemption and concluded that a state law claim that was both preempted by 29 U.S.C. § 1144(a) and also fell within the scope of ERISA's civil enforcement scheme, 29 U.S.C. § 1132, was federal in character and removable to federal court. 481 U.S. at 64-66. *See also, Aetna Health, Inc. v. Davila*, ___ U.S. ___, 124 S.Ct. 2488, 2495-96, 159 L.Ed.2d 312 (2004) (state law causes of action within the scope of the civil enforcement provisions of § 502(a) are preempted and removable to federal court); *Toumajian v. Frailey*, 135 F.3d 648, 654 (9th Cir. 1998) (citing *Taylor*) ("Only if [a state court] complaint asserts a state law claim that can be reasonably characterized as a claim under any of ERISA's civil enforcement provisions can the action be properly removed").

The Ninth Circuit properly applied this analysis when it concluded that respondent's state law breach of contract claim was not removable to federal court because it fell outside the scope of ERISA's civil enforcement scheme and therefore could not reasonably be characterized as a federal claim.

II. The Ninth Circuit's Decision Does Not Conflict with Any Decision of this Court

Petitioners claim that the Ninth Circuit's decision conflicts with several of this Court's prior decisions. Petition at 9-12. Respondent has explained above that the Ninth Circuit's decision is consistent with *Pilot Life Ins. Co. v. Dedeaux* (*see* footnote 5, *supra*) and *Metropolitan Life Ins. Co. v. Taylor* (*see* Section I.B., *supra*). Petitioner also claims that the Ninth Circuit's decision is inconsistent

with *Great-West Life & Annuity Ins. Co. v. Knudson.* Petitioners argue that *Great-West* stands for the proposition that a state law breach of contract claim for reimbursement is completely foreclosed by ERISA. Petition at 10. Petitioners ignore the fact that the Court in *Great-West* expressly left open the question of "whether a direct action by petitioners against respondents asserting state-law claims such as breach of contract would [be] preempted by ERISA." *Great-West*, 534 U.S. at 220. The Ninth Circuit's decision here does not conflict with *Great-West*. It merely answers correctly the question that *Great-West* posed but did not answer.

Petitioners also claim that the Ninth Circuit's decision conflicts with this Court's opinion in *Aetna Health, Inc. v. Davila.* Petition at 11-12. Petitioners are wrong. In that consolidated appeal, a participant in and a beneficiary under two separate ERISA plans sued their respective plan administrators under the Texas Health Care Liability Act in state court, alleging that they suffered injuries due to the administrators' decisions not to provide coverage for treatment recommended by their physicians. 124 S.Ct. at 2493. In considering whether the defendants' state law claims were completely preempted by ERISA and removable to federal court, the Court considered whether the claims fell within the civil enforcement provisions in § 1132. 124 S.Ct. at 2494-97. The Court concluded that the defendants' claims were intended only to rectify a wrongful denial of benefits promised under an ERISA plan, and therefore were both related to an ERISA plan under § 1144(a), and also covered by ERISA's civil enforcement scheme, § 1132. As a result, the Court concluded that the claims were completely preempted by ERISA, and removable to federal court. *Id.* at 2497-98.

The Ninth Circuit properly applied the legal principles of the *Aetna Health* case, but came to the opposite conclusion. The circuit court correctly concluded that respondent's state law breach of contract claim for reimbursement was not removable to federal court, because, unlike the claims in the *Aetna Health* case, it fell outside the scope of ERISA's civil enforcement scheme.

III. The Decision Below Does Not Conflict with Any Prior Decision of the Ninth Circuit or with a Decision of Any Other Circuit Court

Petitioners provide a list of decisions by the Ninth Circuit and by other federal circuit courts that they claim are in conflict with the Ninth Circuit's decision in this case. Petition at 9, 12. None of the cases cited conflict with the decision below. The cases petitioners cite fall into two categories. The first category of cases involves state law claims by a participant or beneficiary to enforce a right to benefits under an ERISA plan. In each case the court found such claims to be preempted by ERISA. *See Englehardt v. Paul Revere Life Ins. Co.*, 139 F.3d 1346 (11th Cir. 1998) (participant's state law fraudulent inducement claim preempted by ERISA); *Shea v. Esensten*, 107 F.3d 625 (8th Cir. 1997) (surviving spouse's state law wrongful death claim for fraudulent nondisclosure and misrepresentation by an HMO preempted by ERISA); *Jass v. Prudential Health Care Plan*, 88 F.3d 1482 (7th Cir. 1996) (participant's state law negligence and vicarious liability claims against plan, physician and nurse for denial of necessary medical treatment preempted by ERISA); *McCoy v. Mass. Inst. of Tech.*, 950 F.2d 13 (1st Cir. 1991) (state mechanics' lien statute preempted to the extent it concerned the rights of employee benefit plans); *Clorox v. U.S. Dist. Ct.*

for N.D. of Cal., 779 F.2d 517 (9th Cir. 1985) (employee's state law claims relating to improper handling of employee benefits claims and negligent management of employee benefit plan preempted by ERISA).

In this case, the Ninth Circuit concluded that respondent's state law breach of contract claim was not preempted. The court reasoned that, unlike the claims at issue in the cases cited above, adjudication of respondent's state law breach of contract claim "does not require interpreting the plan or dictate any sort of distribution of benefits. Providence has already paid ERISA benefits on behalf of the McDowells, and they are not disputing the correctness of the benefits paid." *Providence Health Plan*, 385 F.3d at 1172, App. A-7. The Ninth Circuit's decision is consistent with each of the cases cited above, but, on the facts of this case, reaches the opposite conclusion.

The second category of cases cited by petitioners involves federal claims for reimbursement of benefits paid. In each case, the court found that such claims are not properly brought in federal court under ERISA. *See Qualchoice, Inc. v. Rowland*, 367 F.3d 638 (6th Cir. 2004), *pet. for cert. filed*, ___ U.S. ___ (federal claim for reimbursement of benefits paid by health care plan not allowed under 29 U.S.C. § 1132(a)(3)); *Cooperative Benefit Adm. v. Ogden*, 367 F.3d 323 (5th Cir. 2004) (same); *Community Health Plan v. Mosser*, 347 F.3d 619 (6th Cir. 2003) (same); *Honolulu Joint App. & Train. Comm. v. Foster*, 332 F.3d 1234 (9th Cir. 2003) (federal restitution claim brought by committee that administered training program against a former employee for breach of scholarship loan agreement not allowed under 29 U.S.C. § 1132(a)(3)); *Primax Recoveries v. Sevilla*, 324 F.3d 544 (7th Cir. 2003) (federal claim for reimbursement of benefits paid by health care plan not permitted under 29 U.S.C.

§ 1132(a)(3)); *Westaff v. Arce*, 298 F.3d 1164 (9th Cir. 2002) (same); *Bauhaus USA v. Copeland*, 292 F.3d 439 (5th Cir. 2002) (same); *Reynolds Metals v. Ellis*, 202 F.3d 1246 (9th Cir. 2000) (same); *Cement Masons Health and Welfare Trust Fund v. Stone*, 197 F.3d 1003 (9th Cir. 1999) (same); *FMC Medical Plan v. Owens*, 122 F.3d 1258 (9th Cir. 1997) (same); *Pacificare v. Martin*, 34 F.3d 834 (9th Cir. 1994) (same).

Again, the Ninth Circuit's decision does not conflict with any of these cases. The majority opinion in *Great-West* stands for the same proposition as does each of the cases cited above: a fiduciary's claim to enforce a reimbursement provision is not within the scope of 29 U.S.C. § 1132(a)(3), and thus does not properly lie in federal court. The Ninth Circuit's decision in this case addresses a different question – whether a fiduciary's claim to enforce a reimbursement provision can proceed in state court – and concludes that the state law claim is not completely preempted by ERISA and may go forward in state court. For all of the reasons described above, the Ninth Circuit's conclusion is correct.

IV. The Existence of Two Contrary State Intermediate Appellate Court Decisions Does Not Warrant this Court's Review

Petitioners point to the existence of two opinions issued by intermediate appellate courts–one from California and the other from Oregon–as a reason why this Court should grant review in this case. *Liberty N.W. Ins. Corp. v. Kemp,* 85 P.3d 871 (Or. Ct. App. 2004) (insurer's action for reimbursement is preempted by ERISA); *Jefferson-Pilot Life Ins. Co. v. Krafka,* 57 Cal. Rptr. 2d 723 (Ct. App. 1996) (same). Petition at 25. In response to petitioners' petition for rehearing, the Ninth Circuit amended its original opinion to address these state cases. The court concluded:

> We are cognizant that our decision is in conflict with the decisions of some states [citing *Liberty N.W.* and *Jefferson-Pilot Life* cases]. However, in light of our precedent and the Supreme Court's recent direction in *Great-West*, we cannot agree with these courts' construction of "relate to," and instead we agree with those states that have found no ERISA preemption. *See, e.g., Behavioral Sci. Inst. v. Great-West Life*, 84 Wash. App. 863, 930 P.2d 933 (1997) (finding no preemption of action by self-insured employer against "stop loss" reinsurer for breach of contract and bad faith where reinsurer denied stop-loss coverage of employee's medical treatment).

Providence Health Plan, 385 F.3d at 1173; App. A-9 – A-10.

Particularly given the existence of this Ninth Circuit decision, the existence of a single intermediate appellate court decision in each of only two states is not a sufficiently compelling reason to require the Court's review.

CONCLUSION

For the reasons discussed above, the Court should deny the petition for writ of *certiorari* in this case.

Respectfully submitted,

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